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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 305

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

v.

W. D. PIDD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AND BRIEF IN SUPPORT).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (AND BRIEF IN SUPPORT).

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on June 5, 1952, rehearing denied July 21, 1952.

Opinion Below.

The opinion of the Court of Appeals is reported in 197 F. 2d 153 (Advance, Aug. 11, 1952). A copy of it will be seen at page 397 of the transcript of record, and at page i of the Appendix hereto. The opinion affirms a judgment of the District Court for the Southern District of Florida in connection with which no opinion was rendered.

Jurisdiction.

The judgment of the Court of Appeals having been entered June 5, 1952 (R. 385), and that Court having denied on July 21, 1952 a rehearing (R. 398, the jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254(1).

Questions Presented.

1. Whether the standard of care and conduct prescribed by the Court of Appeals for the operation of a railroad train at a grade crossing reasonably can be observed; and

2. Whether such standard conflicts with the standard laid down by the laws of the State.

Statutes Involved.

The pertinent statutory provisions are Sec's. 320.45, 768.01, 768.02 and 768.06, Fla. Stat. 1941 (*Id.*, FSA). They are printed in the Appendix, pp. vii-ix.

Statement.

The action is one for the death of plaintiff's wife at a railroad grade crossing in Florida resulting from a collision between a Coast Line train and an automobile which she was driving. The train was the Company's West Coast Champion, one of its "crack non-stop trains" between St. Petersburg and New York (R. 212).

That of course is not the reason we seek to bring the case here, but because it presents the questions just stated.

The accident occurred in the countryside about one mile distant from a small village. The railroad track and

the highway cross each other diagonally at an angle of about 35 degrees. The highway was said to be a heavily travelled one and the collision to have occurred at a heavy traffic hour. At the time of the accident, two other motor vehicles were approaching immediately near the crossing from the same direction as was the decedent, and two from the opposite direction. All of them stopped to permit the train to pass.

The highway is straight and level in the direction from which the automobile came for 657 feet from the crossing. The railroad track in the direction whence the train came is straight and level for one-half mile, and the railroad right of way is 60 feet wide on each side of the center line of the track. As the motorist bore down on the crossing, her view towards the approaching train was greatly obstructed until she reached a point 109 feet from the crossing, whereupon, as the opinion says, "the view down the track to the south opens up rapidly" (R. 379), or, as the record shows (R. 192, 202), she could see without obstruction of view 1,439 feet.

As the automobile approached the crossing, it passed consecutively four separate signs warning travelers of the crossing's existence, beginning 563 feet away and ending 25 feet from the crossing;

(1) 563 feet from the crossing there was painted on the pavement with white paint a sign consisting of a large "X" extending about 21 feet along the pavement, and this "X" was flanked on its right and left by large letters "RR";

(2) On the shoulder of the highway to the right, 279 feet from the crossing, there was a round reflector type warning sign 30 inches in diameter bearing a black "X", flanked on the sides by the letters "RR";

(3) At a point 184 feet from the crossing, there was a conventional crossing sign, 3 feet by 4 feet in area, at an elevation of 7 feet above the ground, bearing diagonal black lines making a large "X" across its face, and reading, "STOP— R R CROSSING—FLA. LAW"; and about 10 inches beneath that sign, attached to the same post, was another white sign bearing in large black letters, "Atlantic Coast Line";

(4) On the pavement, 25 feet before the automobile reached the rails, there were painted with white paint two parallel bars one foot wide extending entirely across the highway.

About 50 feet across the track just off the right shoulder of the highway, about 8 feet above the ground, there was the usual "cross buck" railroad warning sign, bearing in large black letters on white background the words "Railroad Crossing", while to the left of the highway pavement, across the track, also in clear view of the approaching automobile, were observable the backs of two other warning signs.

The decedent had another warning as she came to the crossing. One of the motorists who had been approaching the crossing from the opposite side saw the danger into which she was driving, and turned on his headlights and flicked them off and on several times—but Mrs. Pidd "didn't seem to pay any attention, just kept coming at the same rate of speed" (R. 272). The flashings of his lights were observed, however, by a witness across the track from him (R. 288).

"When decedent was approximately 83 feet west of the crossing [the direction whence she came], she suddenly and forcibly applied her brakes, her car skidded to and *stopped upon* the crossing, leaving clearly visible skid marks along

the pavement for that distance. The passenger on the front seat got out safely, but the train struck the car as decedent was endeavoring to get out, inflicting fatal injuries". (The Court's opinion, R. 380; emphasis added.)

The collision occurred at 4:23 P. M. on a clear, sunny day. The automobile approached the crossing at a speed of 30 to 35 miles per hour and the train at a speed of 45 to 50 miles per hour. The train, pulled by a diesel locomotive, was, as the opinion says, "coasting with power off", but, as the opinion also says, "giving the usual crossing signals with whistle and bell".

There were no flashing lights or crossing gates at the crossing; but, as the Court's opinion states, under the Florida law negligence will not be imputed to the railroad company because of their absence, and the fact that they were not present is not at all for a trial jury's consideration but only for a grand jury's or the legislature's. *Atlantic C. L. R. Co.* v. *Wallace,* 61 Fla. 93, 54 So. 893 (1911).

The automobile approached the track from the fireman's side of the locomotive. He was keeping a good lookout (R. 219, 220). The engineer was, too, on his side of the track (R. 230). He was unaware of the approach of the Pidd automobile until the fireman shouted to him. The fireman first saw the Pidd automobile "through the trees" when it was about 200 to 250 feet away, more clearly when it was around 150 feet from the crossing (R. 219). As soon as he realized that the motorist would not stop he shouted to the engineer (R. 222), whereupon the engineer applied the brakes with the heaviest possible service application (R. 221). So close then to the crossing were the two vehicles that application of the emergency brakes would have made no difference in the collision (R. 208). "I thought one time", said the fireman, "it was going to go

across, and then again it looked like it was going to stop. It could have done either one, looked like" (R. 219). The locomotive was within 15 or 20 feet of the crossing when he realized that the automobile was in peril (R. 222). Up until that moment, "I thought she would stop or go on across. Or either, at the least, she would turn down the dirt road" (which branched off to the right from the paved highway at a point about 25 feet from the crossing and proceeded approximately parallel with the railroad track) (R. 230). To a female motorist, stopped next behind decedent, "It went through our minds . . . that if she kept going instead of trying to stop, she would have made it across the track. The very fact that Mrs. Enos [the decedent's companion passenger] was able to get out of the car indicated that there was some time there" (R. 121).

The engineer, who, as stated, was watching the highway traffic approaching from his side of the locomotive (R. 237), and who thought that he was about 35 or 40 feet from the crossing when the fireman shouted, said that " it positively would not" have been physically possible to stop the train, running at the speed it was, between the time that he first realized that the car was in peril and the moment it was struck—it would not have been possible if the speed had been as slow as 25 miles per hour; and "the only speed that I could possibly have stopped, after seeing the car, would have been around from four to five miles an hour, then I possibly could have got stopped" (R. 241). That testimony was not contradicted; it was corroborated by a mechanical and operational expert who testified that if the locomotive, running 45 to 50 miles per hour, had been so far as 75 or 100 feet from the crossing at the time the automobile stopped on it, it would not have been possible to stop the locomotive before it reached the crossing, and that if the train, whose consist he gave as weighing approxi-

mately 750 tons, had been running 25 miles per hour and efforts had been made to stop it 100 feet before it reached the crossing, it could not possibly have stopped before arriving at the crossing, but would have passed 4 or 5 feet beyond the crossing before stopping (R. 208, 209).

Judgment upon a jury verdict went against the Coast Line in the District Court, and the Court of Appeals affirmed.

That Court held that the decedent was negligent, but said that only a jury could decide whether the railroad company was not negligent and whether the sole proximate cause of the tragedy was decedent's failure to stop or look before reaching the crossing as required by a Florida statute.

That Florida statute (Sec. 320.45, Fla. Stat. 1941, reproduced in the Appendix at p. vii), prescribes that no motorist shall cross or attempt to cross a railroad track which has been designated by the Florida State Road Department as a dangerous crossing (and this crossing had been so designated), without first bringing the vehicle to a full stop, whereupon the driver should look in both directions and listen.

Contributory negligence in a case of this sort does not wholly exonerate the defendant railroad company, by reason of the Florida statute which is quoted at page ix of the Appendix.

The Court of Appeals made no expression indicating wherein the train crew was negligent, but held that "typical matters for jury appraisal" were the following: (1) the decedent was unfamiliar with the crossing while the engineer of the train was thoroughly familiar with it. (If and since he was, we interject, he was familiar with the warning signs that faced the motorist, had a right to anticipate that all motorists approaching the crossing would preserve

the legal amenities of the situation, and hence had a right to expect and to rely upon the expectation that she would heed the signs); (2) the fact that the crossing was heavily travelled and that the collision occurred at a heavy traffic hour; (3) whether, considering the speed of the train and the restricted view at the crossing, the signals given were reasonably adequate or whether slower speed or more effectual signs were essential to due care in the circumstances; and (4) whether the engineer was reasonably alert in discovering decedent's peril and in stopping the train.

The opinion also pointed out that the train's brakes were not applied until it was within about 20 feet of the crossing, although the fireman testified that he saw the automobile through the trees when the train was 200 to 250 feet south of the crossing.

Specification of Errors Urged.

The Court of Appeals erred:

1. In omitting to apply the standard of conduct prescribed by the Florida Supreme Court for the operation of railroad trains over highway crossings;

2. In following, instead, its own standard, laid down by it in a previous decision;

3. In affirming the judgment of the District Court.

Reasons for Granting the Writ.

1. The Court of Appeals has laid down here a standard of train operation to be observed by locomotive engineers which cannot be complied with if the rail transportation

of the nation is to move with the speed demanded by the traveling and shipping public.

It is not simply a question of the operation of this particular train at this particular crossing. It is a question of the operation of hundreds of trains every day over thousands of highway grade crossings in the State of Florida, and in the States of Alabama and Georgia where Coast Line's trains also run.

There is not the slightest dispute that for the train to have stopped before reaching the crossing, if attempts to stop it had been made when the fireman first realized that the automobile would not stop, the speed of the train would have had to have been as low as four or five miles per hour.

The restriction of operation of a train that the Court of Appeals commands in this kind of a case is of the same sort as that condemned in *Seaboard Air Line R. Co.* v. *Blackwell,* 244 U. S. 310 (1917) in proscribing a Georgia statutory standard which undertook to require a train engineer to begin checking his speed when 400 yards from each public crossing at grade so as to stop in time to avoid collisions there should they be likely.

2. The standard applied in this case is not prescribed by the Florida State Courts. It is one erected by the Court of Appeals itself. It is inconsistent with the standard set by the Supreme Court of Florida.

The Standard Set by the Florida Supreme Court.

It is stated in such cases as the following:

1. *Atlantic C. L. R. Co.* v. *Timmons,* 160 Fla. 754, 36 So. 2d 430 (1948).
2. *St. Louis-San Francisco Ry. Co.* v. *Baker,* ..... Fla. ....., 49 So. 2d 324 (1950).

3. *Powell* v. *Gary*, 146 Fla. 334, 200 So. 854 (1941).

4. *Roberts* v. *Powell*, 137 Fla. 159, 187 So. 766 (1939).

5. *Florida E. C. Ry. Co.* v. *Davis*, 96 Fla. 171, 117 So. 842 (1928).

6. *Covington* v. *Seaboard A. L. Ry. Co.*, 99 Fla. 1102, 128 So. 426 (1930).

1. *Timmons* (36 So. 2d 430; 1948) collided with a Coast Line train at a crossing in a country village in broad open daylight where the right of way was 100 feet wide. The train was "moving fast [70 to 80 miles per hour] and perhaps above the customary rate of speed", but the bell was ringing and the whistle was blowing, and *when Timmons reached the right of way* he had an unobstructed view (4,000 feet) towards the oncoming train. The Florida Supreme Court stated the Florida law as follows:

> "The railroad has a right to assume that one crossing its tracks will at least look to see if there is an approaching train, and if so, he will not plunge into its pathway".

After stating the several principles announced by this Court in *Baltimore & O. R. Co.* v. *Goodman*, 275 U. S. 66 (1927), and *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98 (1934), the Court said:

> "We approve the latter rule [Pokora's] in this State and when, as here, it is conclusively shown that the plaintiff did not look or listen, that there was no obstruction whatever to the vision, that the accident took place in a rural community where looking or listening would have avoided it, he is guilty of negligence which was the sole proximate cause of his injury and cannot recover. . . . He was on notice that he was approaching a place of danger and must

look out for the train, lest he suffer the consequences. He failed in this, and in doing so, was the sole cause of the accident".

2. *Baker's* case (49 So. 2d 324; 1950) also happened on a clear day, with straight track and highway. Baker also choked his automobile down upon the crossing just as Mrs. Pidd did, and a passenger in Baker's car escaped safely, just as Mrs. Pidd's passenger did. At the instant the Baker car stopped, the engineer applied his brakes at a moment when his engine was from 400 to 500 feet away from the crossing, running 45 miles per hour, but he was unable to stop. Holding there could be no recovery, the Florida Supreme Court said:

> "Under such a state of facts we think the proximate cause of the accident was the stalling of the automobile on the crossing. Baker had plenty of time to cross the railroad had his car not stalled. The engineer was proceeding cautiously and did all in his power to stop his train when the danger appeared. He is not charged with negligence for not anticipating that Baker's car would stall. The track was level where the accident took place and he was warranted in assuming that Baker was in possession of his faculties, would avoid the train or would not attempt to cross ahead of it unless he had plenty of time to clear. Baker nor the engineer anticipated that the car would stall, but having done so, we do not think defendant can be held responsible.
>
> "The engineer unquestionably had a duty to do all he could to protect the Bakers when he saw that their car had stalled but under the facts in this case his duty commenced at the point. Baker was under the obligation to look and listen for the train and the circumstances may require him to stop, look and listen".

3. *Gary's* collision (200 So. 854; 1941) occurred at a crossing in a village in open daylight with straight track and highway. The speed of the train was estimated from 60 to 80 miles per hour, but it approached giving all proper warnings. The motor vehicle driver did not stop, but he looked in the direction from which the train came at a moment when it either was not in sight or he did not see it; he then looked down the track in the opposite direction, but did not look again in the direction of the train. It was apparent, however, that had he done so he must necessarily have seen the train as there was an unobstructed view to the south (as here) for at least a quarter of a mile. The Court held that under the facts, "the damage alleged was proximately caused solely by the negligence" of the truck driver; that there could be no recovery, and that "the mere rapid speed of the train would not alter this well settled rule of law".

(The rule is stated to have been then "well settled" because it had been in force in Florida since 1925. *Atlantic C. L. R. Co* v. *Gornto,* 89 Fla. 97, 103 So. 117).

The opinion of the Court of Appeals here (R. 383) says that "This case differs under the facts from *Van Allen* v. *ACL Railroad Co.* (CCA-5) (109 F. 2d 780)". The difference is that Van Allen's case occured in the City of Tampa; the motorist's view was obscured until he reached a point within 44 to 54 feet of the track, and the train was running 30 miles per hour. The Florida Supreme Court, in its opinion in *Gary's* case (200 So. 854; 1941), cited *Van Allen* approvingly.

4. The collision on account of which *Roberts* sued (187 So. 766; 1939) occured in bright daylight at a small village with a straight track and highway and a train running 50

to 55 miles per hour giving proper signals of its approach "by blowing the whistle and ringing the bell". That crossing was equipped with flashing lights. There was no dispute but that the flashing lights were operating, but the evidence was in hopeless conflict as to whether whistle signals were given. But Roberts did not stop or slow down, and on the contrary drove around an automobile that had stopped for the train to pass. It was held that his own heedlessness was the sole cause of the collision.

5. *Davis* (117 So. 842; 1928), having stopped for a train on one of the two double tracks to pass, drove his automobile onto the other of the double tracks without looking and was struck by a train coming from the opposite direction at a speed of 40 to 50 miles per hour with whistle blowing and bell ringing. His view of the approaching train was obscured by a small warehouse 22½ feet wide, 18 feet and 3 inches from the track on which he was struck, but a person *15 or 16 feet from that track* could see "perhaps 1500 feet down the track" in the direction whence the train came. Under those facts, said the Florida Supreme Court:

> "It seems clear that the injury was caused by the Plaintiffs' own negligence, since, if they had in fact looked down the track, they would have seen the train before going so near the track and injury was inevitable".

6. *Covington* (128 So. 426; 1930), a small boy and a guest passenger in an automobile operated by his father, was struck at a railroad crossing in a small town by a train running 35 miles per hour in a zone where the speed was limited by ordinance to 12 miles per hour. The driver of the automobile did not have an unobstructed view in the direction of the approaching train until within *75 feet* of the track. In that situation, the Florida Court said:

> "The fact of the approaching train was obvious . . . By the exercise of reasonable prudence, Mr. Covington could have seen the approaching train in time to have stopped his automobile which was under control. His failure to use such precaution would preclude the plaintiff from recovering for the injury sustained."

The Crossing Law of the Fifth Circuit Court of Appeals.

It originated in *Lowry* v. *Seaboard A. R. Co.*, 171 F. 2d 625 (1948). That accident occurred at a street crossing in the City of Jacksonville, Florida. The motorist's view of the approaching train was obstructed, but a passenger bus also approaching the crossing had heard the train and seen its headlight and the bus driver had stopped and opened his door according to custom. Lowry drove around the bus and met the train at the crossing. The Court of Appeals reversed a directed verdict for the Seaboard, and did so upon this peculiar reasoning:

> "Whether a verdict should be directed in a federal court is a matter of federal law, having to do with the right of jury trial under the Constitution of the United States . . . the federal law was stated in Grand Trunk Ry. Co. *v.* Ives, 144 U. S., at page 417 . . . Under this rule, invoked by the railroad company here by removing the case to the federal court, we think there was matter, as above pointed out, for a jury to decide."

Although that decision was after *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), no attempt was made for certiorari and the opinion stands on the books unrebuked.

The view that the Fifth Circuit Court of Appeals gives to the state law in cases of this sort is stated thus in a case

which went to it from a District Court in Louisiana, *Henwood* v. *Wallace*, 158 F. 2d, 263 (1947):

> "The question before this court, on appeal, is not what we would have done if we had been members of the jury, or what a Louisiana trial court, sitting without a jury, would or should have done, or even what the Supreme Court of Louisiana would do in reviewing the case upon both the law and the facts."

That quotation seems to indicate that the Court of Appeals for the Fifth Circuit may not be too much impressed with the crossing law of any of the states in its circuit.

The opinion of the Court of Appeals here leaves very much to the general view of the jury. Under Florida law a jury's view of negligence must be precise; negligence is gauged by foreseeability not by retrospect, and an actionable act or omission of negligence in Florida is one which "naturally and ordinarily should have been regarded as a *probable,* not as a merely *possible,* result of the simple negligence of another. Conversely when the loss or injury is not a direct result of the mere negligence, and the loss or injury is not a natural ordinary sequence or such as naturally and ordinarily should have been regarded as a *probable,* and not a merely *possible,* result of the simple negligence, the negligence is not actionable. See 2 M. A. L. p. 114 *et seq.*" *Tampa E. Co.* v. *Jones,* 138 Fla. 746, 190 So. 26, 27 (1939), quoting from *Seaboard A. L. Ry. Co.* v. *Mullin,* 70 Fla. 450, 70 So. 467, 469 (1915).

Conclusion.

Our justification for this petition is the high desirability that our railroad shall know whether it is bound in the States of Florida, Alabama and Georgia to undertake to comply with the standard of operation of its trains at grade crossings laid down by the Court of Appeals in this case notwithstanding the complete impracticability of the observance of such a standard.

That point is not an abstract one because, under the facts here, it is difficult indeed to see wherein the Court of Appeals thought that a jury properly might have found negligence in the operation of the train. It is just about impossible if the standard of propriety in the train's operation is measured by the Florida cases and not by the loose standard which the Court of Appeals itself has set down.

Since proximate cause is "that particular cause in the absence of which the collision would not have occurred", it seems plain that the motorist's heedless disregard of the warning signs alongside the highway and of the train's blowing whistle and ringing bell constituted the sole proximate cause of the accident.

Therefore how can the Court of Appeals be permitted to permit a jury to speculate as to whether there was something negligent in the operation of the train that contributed to the injury?

That Court says that a jury properly might have found that in view of the train's speed, and what the Court calls "the restricted view of the crossing", the signals given of the train's approach were inadequate, and that "slower speed or more effectual signals" were essential to due care on the part of the railroad company—when the opinion had already said (R. 380) that the approaching locomotive was

"giving the usual crossing signals with whistle and bell"; and the Florida cases cited show that under such circumstances as those here, the speed of the train has nothing to do with the cause of the accident (see *ante,* page 12, *Powell* v. *Gary,* 146 Fla. 334, 200 So. 854; 1941).

It will be seen, we hope, that this is not "simply another crossing case"; and that it will be apparent, as we stated in the beginning, that the opinion complained of does lay down a standard of propriety for the operation of railroad trains in Florida at grade crossings which is not in accord with the standard prescribed by the Florida courts, and which is so restrictive that it cannot be complied with if railroad trains in that State are to maintain their required fast schedules; and that such schedules can be maintained only if the railroad, bound by the economic and competitive necessities to maintain the schedules if it is to survive, chooses to shut it eyes to the standard and to take the chance that other heedless motorists will not bring further liability upon the Company.

We find that this Court has not considered a grade crossing case since 1934 when it decided *Pocora's,* 292 U. S. 98 and *Fairport P. & E. Co.* v. *Meredith,* 292 U. S. 589, since when transportation speeds have increased everywhere due to the pressure of insistent public demand and, almost everywhere, the courts have taken notice of that demand and have refused to charge railroads with negligence for operating trains through the countryside at speeds of 55, 60, 75, 80 miles per hour. *Constantine* v. *Pennsylvania R. Co.* (7th Cir., Ind., 1940), 114 F. 2d 271, 274; *Robins* v. *Pitcairn* (7th Cir. Ill., 1941), 124 F. 2d 734, 736; *Baltimore & Ohio R. Co.* v. *Deneen* (4th Cir. W. Va., 1947), 161 F. 2d 674, 676; *Plough* v. *Baltimore & Ohio R. Co* (2nd Cir. N. Y., 1949), 172 F. 2d 396, *cert. denied* 337 U. S. 940. *Cf. Kenan*

v. *Austin* (1941), 146 Fla. 389, 1 So. 2d 174, not with respect to speed, but for its holding that the Florida courts "are conscious of the demand of the public on the railroad companies for speed and efficiency and that such demand should be met".

The two points presented by the petition seem to us so important to the operation of all railroad trains in the State of Florida as to justify the consideration of this Court; and we hope that the Court will think so too.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 13757.

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

versus

W. D. PIDD,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(June 5, 1952.)

Before HUTCHESON, Chief Judge, and BORAH and STRUM, Circuit Judges.

STRUM, Circuit Judge: This is an appeal in a railroad grade crossing case, tried to a jury, with verdict for plaintiff below.

Mrs. W. D. Pidd, a 46 year old housewife for whose death the verdict was returned, was driving a car with her sister as a passenger in the right-hand front seat, along U. S. Highway 441. About one mile east of the town of Oklawaha, in Marion County, Florida, where the highway runs approximately in an easterly-westerly direction, defendant's tracks cross it diagonally from southeast to northwest at an angle of about 35 degrees. Decedent was unfamiliar with the crossing, though she had once crossed it going in the opposite direction several days before her fatal injury.

When injured, decedent was driving from west to east along the highway. The train was proceeding from southeast to northwest, thus approaching the crossing from the right-hand side of decedent's car—the side away from the driver. The railroad tracks southeast of the crossing, from whence the train was approaching, are straight and level for approximately half a mile. The highway is straight and level for a distance of about 657 feet west of the crossing, where it begins to curve to the south. The decedent had just rounded this curve and was proceeding easterly along the straight stretch of road when the collision occurred. Approaching the crossing from the west, going toward the east, as was decedent, several warning signs are in view. At a distance of 563 feet west of the crossing, there was painted on the pavement with white paint, a sign consisting of a large "X," extending about 21 feet along the highway, flanked on its right and left by a large letter "R." On the south shoulder of the highway, on decedent's right, 279 feet west of the crossing, there was a round reflector type warning sign, 30 inches in diameter, with a black "X" flanked on either side by the letter "R." At a point 184 feet west of the crossing, there was a white sign, 3 by 4 feet, at an elevation of 7 feet above the ground, bearing diagonal black lines making a large "X" across its face, and reading "Stop—R. R. Crossing—Fla. Law." On the pavement 25 feet west of the crossing there were painted, with white paint, two parallel bars, one foot wide, extending across the highway. The decedent passed these signs in approaching the crossing. Across the track and immediately to the east of the crossing, on the right-hand shoulder of the road, was the usual "cross-buck" railroad warning sign, while still further east but on the left of the road could be seen the backs of two warning signs.

West of the crossing, along the south side of the highway, and in the area between the highway and the railroad, but off the railroad right of way, there is a dense and almost continuous growth of low trees, foliage, and undergrowth, also a sizable building, all of which combine to obstruct an east bound traveler's view of a train approach-

ing from the south, and the engine crew's view of a car approaching from the west, until they are quite near the crossing. To a traveler approaching from the west, the crossing is practically a "blind" one until the traveler is within approximately 109 feet of the crossing, when the view down the track to the south opens up rapidly. Until then, however, a train approaching from the south is concealed by the foliage from the view of such a traveler.

The collision occurred on Saturday, May 13, 1950, about 4:23 o'clock in the afternoon, at which time traffic is heavy in this vicinity. The weather was clear and sunny. Decedent approached the crossing at a speed of 30 to 35 miles per hour. The train, powered by a diesel locomotive, approached at 45 to 50 miles per hour, coasting with power off, giving the usual crossing signals with whistle and bell. The brakes were applied about 20 feet south of the crossing, but the train did not appreciably slow down before the collision. It stopped with its rear end 700 to 1,000 feet north of the crossing.

When decedent was approximately 83 feet west of the crossing, she suddenly and forcibly applied her brakes. Her car skidded to and stopped upon the crossing, leaving clearly visible skid-marks along the pavement for that distance. The passenger on the front seat got out safely, but the train struck the car as decedent was endeavoring to get out, inflicting fatal injuries. In an action under Fla. Stat. 1951, Secs. 768.01 and 768.02, the jury awarded her surviving husband $18,000 damages.

On appeal, the railroad company contends (1) that it was guilty of no negligence, and (2) that the sole proximate cause of the collision was decedent's failure to stop and look before reaching the crossing, as required by Fla. Stat. 1951, Sec. 320.45.

The duties and obligations of a railroad company and of a traveler on the highway at a public crossing are mutual and reciprocal. The trains have the right of way, and it is the duty of a highway traveler to give them precedence, but it is also the duty of the railroad company to exercise reasonable care for the safety of travelers on the highway,

to give warnings of a train's approach which will be reasonably effective in the circumstances, and to have its train under control appropriate to the circumstances. It is of course the duty of a traveler on the highway to exercise reasonable care for his own safety. The degree of diligence and caution to be exercised by each is such as a prudent man would exercise in the circumstances involved. *Roberts* v. *Powell* (Fla.) 187 So. 766; *T. & P. Ry. Co.* v. *Cody*, 166 U. S. 606, 41 L. Ed. 1132. A railroad company can not regulate or remove obstructions which are off its right of way. But it can, and should, regulate the speed of its trains, and the signals of their approach at crossings, so as to give reasonably adequate warning in the circumstances to a traveler who is exercising reasonable care for his own safety. *A. C. L. Railroad Co.* v. *Weir* (Fla.) 58 So. 641.

We do not say that this decedent was free from negligence. On the contrary, there is ample evidence to sustain a finding of negligence on her part. But neither can we say that, as a matter of law, the railroad company was free from negligence. In actions of this character in Florida, contributory negligence is not a complete defense. In railroad cases, when both parties are at fault the plaintiff may recover, but the amount of the recovery is reduced in the proportion that plaintiff's negligence bears to the negligence of both parties. Fla. Stat. 1951, Sec. 768.06.

Even if decedent was negligent, the character of the crossing[1] is to be considered, along with the restricted view toward the south; the fact that decedent was unfamiliar with the crossing while the engineer of the train was thoroughly familiar with it; the fact that the crossing was heavily traveled and that the collision occurred at a heavy traffic hour; whether, considering the speed of the train and the restricted view at the crossing, the signals given were reasonably adequate, or whether slower speed or more

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Note (1): S. A. L. Ry. Co. *v.* Watson (Fla.), 137 So. 719, affirmed 287 U. S. 86, 77 L. Ed. 180; Northern Pac. Ry. Co. *v.* Moe (CA-8), 13 Fed. (2) 377; Baltimore & O. R. Co. *v.* Flegenhauer (CA-8) 168 Fed. (2) 12; Knorp *v.* Thompson, 212 S. W. (2) 584; 5 A. L. R. (2) 103.

effectual signals[2] were essential to due care in the circumstances; and whether the engineer was reasonably alert in discovering decedent's peril and in stopping the train. Decedent applied her brakes when she was 83 feet from the crossing, indicating that she then saw the train. The train's brakes were not applied until it was within about 20 feet of the crossing, although the fireman said he saw the automobile through the trees when the train was 200 to 250 feet south of the crossing.

While the crossing is well marked, it is also true that a traveler on the highway approaching from the west can not see a train approaching from the south until he is almost on the crossing. The jury may therefore have found that the decedent, being unable to see the train, did not proceed heedlessly into an apparent danger so as to make her negligence the sole proximate cause of the collision. The "cross-buck" sign east of the crossing may also have confused decedent. It was on her righthand side of the road, with the warning words "Railroad Crossing" facing her. She may therefore have thought the crossing was beyond the sign. Instead, the sign was beyond the crossing, as she approached it.

These and other matters which might appropriately be considered on the question of the railroad's negligence, *vel non,* are typical matters for jury appraisal. Reasonable minds might differ thereon. The evidence would support a finding that both parties were negligent, and the amount of the verdict is consistent with an apportionment of the damages in accordance with the Florida statute. It was for the jury to say which of these parties failed to exercise care commensurate with the circumstances, or whether they both failed. *A. C. L. Railroad Co.* v. *Hadlock* (CA-5) 180 Fed. (2) 105; *Lowry* v. *S. A. L. Railway Co.* (CA-5) 171 Fed. (2) 625; *A. C. L. Railroad Co.* v. *Freeman*

Note (2): This is not to judicially determine generally that mechanical or other protective devices are necessary at the crossing at all times, which is a legislative function, but whether due care was used on this particular occasion. See Lowry *v.* S. A. L. (CA-5), 171 Fed. (2) 625.

(CA-5) 193 Fed. (2) 217; *Illinois Central R. Co.* v. *Aucoin* (CA-5), decided April 18, 1952, ... Fed. (2) .... ; *S. A. L. Railroad Co.* v. *Watson* (Fla.) 113 So. 716; *S. A. L. Railroad Co.* v. *Myrick* (Fla.) 109 So. 193. This case differs on the facts from *Van Allen* v. *A. C. L. Railroad Co.* (CA-5) 109 Fed. (2) 780.

Appellant also asserts that the verdict is excessive. A verdict is unreviewable by an appellate court for alleged excessiveness if it is excessive only in fact. It is reviewable only for excessiveness in law, when a refusal by the trial court to set it aside on that ground constitutes an abuse of discretion. The trial court's denial of the motion here involved does not offend that rule. *Sunray Oil Corp.* v. *Allbritton* (CA-5) 188 Fed. (2) 751; *Atlantic Greyhound Corp.* v. *Crenshaw* (CA-5) 99 Fed. (2) 449. This is also substantially the rule in Florida. See *Margaret Ann Super Markets* v. *Scholl*, 34 So. (2) 238.

Appellant also assigns as error the admission, over its objection, of evidence adduced by plaintiff that the train left Leesburg at 4:04 p. m., and that the accident occurred 16½ miles north of Leesburg at 4:23 p. m., so that the average speed of the train over this distance could be computed to be about 52 miles per hour.

Evidence tending to show the speed of a vehicle just prior to a collision is admissible if not too remote, in time or distance, to be relevant. Admissibility of such evidence depends upon the facts of each case, and rests largely in the discretion of the trial court. Compare *Atlantic Greyhound Corp.* (CA-5) 99 Fed. (2) 449; and *A. C. L. Railroad Co.* v. *Hadlock* (CA-5) 180 Fed. (2) 105.

We see no error in admitting the evidence here in question. The testimony is not too remote, and it is pertinent in connection with other testimony as to the speed of the train. The computed speed, about 52 miles per hour, differs only slightly from the engineer's testimony, which was that the train approached the crossing coasting at 45 to 50 miles per hour; that when he applied the brakes he looked at the speedometer, and the speed "was 45, 46, or 47 miles

per hour." Appellant's other employees in the train crew estimated the speed at 45 to 50 miles per hour.

Finding no reversible error, the judgment is

Affirmed.

FLORIDA STATUTES, 1941.

"320.45 *Crossing railway tracks.*

"No person operating any motor vehicle upon a public road shall cross, or attempt to cross, at a point designated by the state road department as a dangerous crossing, any railroad track intersecting the road at grade other than a crossing at which there is a gate or watchman (except on electric railway tracks in an incorporated city or town) without first bringing said motor vehicle to a full stop at a distance of not less than ten feet nor more than fifty feet from the nearest rail, and shall then look in both directions along the tracks and listen for the approach of any locomotive, car or train of cars thereon; provided, however, that the requirements of this section shall not extend to railroad tracks located within the limits of incorporated cities or towns; and provided further, that in any civil action for damages against any railroad company for alleged actionable injuries sustained by any person at any railroad crossing in this state by reason of a collision at said crossing with any engine or train of cars, the provisions of §§ 768.05 and 768.06 relating to liability of railroad companies in actions for negligence shall govern."

"768.01 *Right of action for death due to negligence.*

"Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of

agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed *in rem* against the said ship, vessel or boat, or *in personam* against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued, shall be liable to an action for damages (or if a ship, vessel or boat, to a libel *in rem*, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel *in personam*), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

"768.02 *Parties; damages; proviso.*

"Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither widow nor husband, nor minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support; and where there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person killed. In case of the death of any person solely entitled, or of all the persons jointly entitled to sue, before action brought or before the recovery of a final judgment in action brought by him or them, the right of action or the action as the case may be, shall survive to the person or persons next entitled to sue under this section, and in case of the death of one or more persons jointly entitled

to sue before action brought or before the recovery of a final judgment in an action brought by them, the right of action or the action, as the case may be, shall survive to the survivor of such persons so jointly entitled to sue; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed; provided, that any person or persons to whom a right of action may survive under the provisions of this act shall recover such damages as by law such person or persons are entitled in their own right to recover, irrespective of the damages recoverable by the person or persons whom he or they may succeed."

"768.06 *Comparative negligence.*

"No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."